United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-1149

To be argued by
JAMES E. NESLAND

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1149

UNITED STATES OF AMERICA,
Appellee,

—v.—

VINCENT PACELLI, JR.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Vincent Pacelli, Jr. appeals from a judgment of conviction entered on February 28, 1975, in the United States District Court for the Southern District of New York following a two week trial before the Honorable Charles E. Stewart, United States District Judge, and a jury.*

Indictment 73 Cr. 105, filed January 31, 1973, charged Pacelli alone in two counts with a conspiracy with Barry Lipsky to violate the civil rights of a Government witness,

* Pacelli was originally convicted after a four-day jury trial in May, 1973 before the Honorable Charles H. Tenney, United States District Judge for the Southern District of New York. That conviction was reversed by this Court on January 11, 1974. *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974). Pacelli's petition for certiorari was denied by the Supreme Court. 419 U.S. 826 (1974).

Patsy Parks, by murdering her before she could exercise her right to testify, in violation of Title 18, United States Code, Section 241 (Count 1) and with impeding by force the testimony of the same witness, in violation of Title 18, United States Code, Section 1503 (Count 2).

Trial commenced on January 20, 1975 and concluded on January 31, 1975, when the jury found Pacelli guilty on both counts. On February 28, 1975, Judge Stewart sentenced Pacelli to a term of life imprisonment on Count One and to a five year term of imprisonment on Count Two, to be served concurrently with each other but consecutively to a 20 year term and a 15 year term of imprisonment imposed by the Honorable Milton Pollack, United States District Judge for the Southern District of New York, on Pacelli's two prior narcotics convictions in 71 Cr. 614, see *United States* v. *Pacelli*, 470 F.2d 67 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973), and in 73 Cr. 881, see *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3515 (U.S. March 25, 1975).

Pacelli is presently serving the 20 year sentence imposed by Judge Pollack.

Statement of Facts

The Government's Case

On May 27, 1971, Patsy Parks was subpoenaed and testified before a Grand Jury in the Southern District of New York which later filed Indictment 71 Cr. 614, charging Vincent Pacelli, Jr. and his wife, Beverly Jalaba, and two others with violations of the federal narcotics laws.* (Tr.

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* Indictment 71 Cr. 614 contained five counts. Pacelli, who was named in every count, was convicted of four of the five counts. See *United States* v. *Pacelli, supra.*

73; GX 1) After the indictment was filed, the case was assigned to the Honorable Milton Pollack who, in January, 1972, set February 8, 1972 for trial. (Tr. 82, 89)

On February 3, 1972, at 7 p.m., two agents of the Bureau of Narcotics and Dangerous Drugs attempted to serve Parks at her apartment at 370 East 76th Street, Manhattan, with a subpoena for her appearance at Pacelli's trial. Patricia Quinn, Parks' roommate, answered the door and told the agents that Parks was not at home, as Parks had told her to do. While the agents unsuccessfully sought to learn from Quinn of Parks' whereabouts, Quinn learned from them that they sought to serve Parks with a subpoena, which she saw bore Parks' name and the name of Vincent Pacelli. After the agents left the apartment, Quinn also left, walked to a nearby bar, telephoned Parks at the apartment, and told her that the agents were trying to subpoena her for the Pacelli trial. Before the conversation ended, both decided to meet at another bar. At that meeting, Quinn, Parks and Parks' boyfriend discussed the subpoena for the Pacelli trial, which Parks explained concerned an incident when she had held a box in her apartment for Pacelli. After discussing several alternatives, Parks decided to locate Pacelli through his friend Benny Febre and to seek Pacelli's advice about the subpoena. (Tr. 94-95, 124-29)

Shortly after midnight on February 4, Parks went alone to the Hippopotamus discotheque on 54th Street between Lexington and Third Avenues, where she met Febre. When Parks told Febre that she had to see Pacelli about the subpoena, Febre told her to talk to Barry Lipsky, who was at the same table, about reaching Pacelli.* Parks then told

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* Febre was not available to testify at this trial, and his former testimony was admitted into evidence and read to the jury. (Tr. 209-12).

Lipsky of the narcotics agents' attempt to subpoena her and requested him to arrange for her to meet with Pacelli. Lipsky, who was then employed by Pacelli in the narcotics business, responded that Pacelli could not be contacted by telephone, that he planned to meet him later in the day, and that he would then tell Pacelli that Parks wanted to meet with him. Parks insisted that she had to see Pacelli that very night. Lipsky finally relented. After instructing Parks to remain in the discotheque, Lipsky, who did not have a car, took a taxi to Pacelli's apartment at 501 Pelham Road, New Rochelle, New York (Tr. 209-12, 219-26).*

Instructing the taxi driver to stop at a Mobil gas station near Pacelli's residence, Lipsky walked to the rear of the apartment building and threw pebbles against Pacelli's second-floor bedroom window. A few seconds later, the curtains were opened, and Beverly Jalaba and Ida Bracer looked out at Lipsky, who motioned that he wanted to come in. Lipsky then went to the front of the building where he rang the buzzer for Pacelli's apartment and was admitted. Lipsky walked upstairs to Pacelli's apartment, where he found Beverly Jalaba and her sister Barbara, Ida and Al Bracer, and Pacelli, who was in his undershorts.** In everyone's presence, Lipsky told Pacelli that Parks was at the Hippopotamus, that some men had attempted to subpoena her, and that she wanted his advice. Pacelli immediately responded: "It's that box. It's that God-damned box. She has been to the grand jury and she ratted me

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* It was stipulated that Pacelli then lived in New Rochelle under the alias of Brandt and had no telephone at his apartment.

** The Bracers and Pacellis were not only close friends as this episode demonstrates, but Al Bracer was Pacelli's narcotics partner. (Tr. 214-15).

out".* Pacelli then slammed a fist into his open hand and said aloud: "I know what I have to do." At that point, Al Bracer ordered the three women out of the room. Pacelli then turned to Bracer and asked him: "Do you want to go with me?" When Bracer declined, Pacelli turned to Lipsky and asked him. Lipsky agreed, and Pacelli got dressed. (Tr. 226-29)

Pacelli and Lipsky drove to Manhattan in Pacelli's rented car. En route, Pacelli told Lipsky they would need gasoline to burn the girl's body and stopped on the service road south of a gas station at 73rd Street and East River Drive, Manhattan, where Pacelli instructed Lipsky to buy gasoline. Lipsky walked back to the station, purchased two gallon cans of gasoline from the station attendant, and returned with them to Pacelli, who had remained in the car out of sight of the station. Pacelli said that two gallons were not enough and told Lipsky to return to the station to get more. Lipsky walked back to the station and purchased two additional gallon cans of gasoline. The gasoline was placed in the trunk of the car, and Pacelli and Lipsky continued on to the Hippopotamus, arriving there between 2:00 and 2:30 a.m. on February 4 (Tr. 231-37).**

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* Parks' testimony before the Grand Jury was that on April 22, 1971, Pacelli had come to her apartment and met with Frank Serrano. Pacelli and Serrano left, Serrano returning with a box of money which he gave to Pacelli when Pacelli came back. In addition, Parks testified about an earlier incident on April 18, 1971, when Pacelli and his co-defendants Lisa Possas and Demetrius Pappadakous were in and out of her apartment several times trying to resolve a problem over returning to Detroit or Chicago a paper bag full of money which had been stashed in Parks' apartment. (GX 2; Tr. 76-80).

** Michael Elazat, the attendant working the night shift in February, 1972 at Redas Gulf Station, 73rd Street and East River Drive, Manhattan, identified Lipsky as the man he remembered coming into the gas station on foot twice about 2:30 one morning, first purchasing one gallon can of gasoline and then within minutes

[Footnote continued on following page]

While driving to the Hippopotamus, Pacelli told Lipsky to go into the Hippopotamus, find Parks, and tell her that Pacelli was parked near the church on 54th Street and Lexington Avenue and that she was to wait 10 minutes before joining him there. Pacelli further instructed Lipsky to pick up a book of matches in the Hippopotamus before returning to the car.* Prior to Lipsky's entering the Hippopotamus, Pacelli also told Lipsky that, after Parks was in the car, he would fake a phone call as a signal to Lipsky to take over the driving, so Pacelli would be free to do what he had to do to her. (Tr. 231-37)

Lipsky did as instructed. He entered the Hippopotamus, found Parks, who by that time was somewhat intoxicated, and told her that Pacelli was parked by the church at 54th Street and Lexington Avenue and for her to wait a few minutes and then meet him there. Parks waited at the table of a friend, Matthew Benkovich, and then left.** Ten minutes later, Lipsky followed her as planned. When Lipsky arrived at Pacelli's car, Pacelli was behind the wheel and Parks was seated next to him. Lipsky got in the

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purchasing three more gallon cans of gasoline, each time leaving the station walking south on the service road. (Tr. 756-66). Lipsky gave the same account of first purchasing one can and then three cans of gasoline, instead of two and two, in his confession to Nassau County authorities on March 2, 1972. (GX 7, pp. 6-7).

* Neither Pacelli nor Lipsky were then smokers. (Tr. 236).

** Louis Montilla, who was sitting at Matthew Benkovich's table in the Hippopotamus on February 4, testified that he first met Parks that night when Benkovich brought her to the table about 2:15 a.m. After some casual conversation, Parks returned to her table, talked to a man unknown to Montilla, and then returned to Montilla's table. Quite upset about a problem, she sat at the table for a few minutes looking at her watch and the door, and then she left the table and the Hippopotamus, explaining to Montilla that she had to meet some people at the corner of Lexington Avenue but would be back in 15 minutes. (Tr. 805-09).

back seat, and Pacelli drove off, crossing the 59th Street Bridge on a drive which eventually took all three to Massapequa, Long Island. (Tr. 237-42)

On the drive to Massapequa, Pacelli questioned Parks about her knowledge of his pending narcotics prosecution, about the box, and about the attempt of the agents to serve her with the subpoena. He also asked her if she had ever been fingerprinted, and she responded that she had not. At another point, he offered Parks money to go to Brazil or California, but she refused, stating that she had to remain in New York for her new job and for her child. She assured Pacelli, however, of her good intentions, giving him a kiss on the cheek and stating: "Vinny, you know I would never hurt you or Beverly. I love you both. You are my dearest friends" (Tr. 242-47).

After driving for approximately an hour, Pacelli left the main highway and turned onto a dirt road. After driving aimlessly for a few minutes, Pacelli stopped the car in a desolate area of Massapequa and walked to a nearby outdoor phone booth. Upon his return to the car, Pacelli signaled Lipsky to drive and got into the back seat behind Parks. As soon as Lipsky drove off, Pacelli raised up over the front seat, wrapped his left arm around Parks' head, and plunged a knife into Parks' neck. As he did so, Parks "put her hand up in front of her face to protect her and curled up into a ball and . . . said, 'Vinny, Vinny, don't hurt me, my child, I am a mother.'" Pacelli responded: "What? Are you kidding? Die you bitch," and plunged the knife into her chest a dozen more times until, hunched over her, he told Lipsky she was dead and let her body slump over in the front seat.* At that point, Pacelli, who had lost his

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*It was the opinion of the medical examiner that the neck and chest wounds indicated Parks was the victim of an attack from behind by a right-handed person. (Tr. 1016).

glasses in the struggle with Parks,* instructed Lipsky to drive to a deserted wooded area they had passed moments before. When they arrived, Pacelli told Lipsky to stop the car and to get the gasoline. Pacelli pulled Parks' body from the front seat and threw it into the brush alongside the road. Lipsky carried the cans of gasoline two at a time from the trunk to Pacelli, who poured them over Parks' body. Lipsky put the four empty cans in the trunk and then rejoined Pacelli, who was standing over Parks' body. Afraid of igniting himself because of gasoline spilled on his coat and gloves, Pacelli told Lipsky: "Light a match and drop it." Lipsky did so, and the flames flared 20 feet in the air (Tr. 247-52).**

Both quickly jumped into the car and drove back to Pacelli's apartment. En route, Pacelli cautioned Lipsky to avoid the Hippopotamus, to refrain from saving newspaper accounts of the murder, and not to worry about a murder prosecution since in New York two witnesses to the fact are required. Also, while on the return trip to Pacelli's apartment, they began destroying evidence. First, Pacelli stopped

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* Before he would leave, Pacelli told Lipsky to find his glasses, complaining that he couldn't see without them. Lipsky found the frames and lenses, which had come out of the frame, on the floor in the front and handed them to Pacelli who put them together (Tr. 250). It was stipulated that Pacelli's eyesight was 20/100; and other evidence established that he owned several pairs of glasses specially manufactured to permit the lenses to be removed from the frames and replaced. (Tr. 886-87). In addition, it was stipulated that Pacelli's 1972 driver's license bore a restriction requiring him to wear glasses when driving. Further, Pacelli's former employer testified Pacelli always wore glasses, even when practicing his karate skills. (Tr. 907).

** Parks' body was discovered the morning of February 4 charred beyond visual recognition. An autopsy was performed on the same day, and the medical examiner determined that death resulted from massive hemorrhaging due to multiple stab wounds to the heart, lungs and neck. After a week of investigation, the body was identified by a foot print and dental charts as that of Parks. (Tr. 1004-07).

at a gas station in Manhattan and had Lipsky empty Parks' pocket book, disposing of the contents in a trash can. Pacelli then drove to a body of water several blocks from his New Rochelle apartment, handed Lipsky the murder weapon and told him to toss it into the water. Lipsky did so and they continued on to Pacelli's apartment. (Tr. 253-59)*

At Pacelli's apartment, Pacelli told Lipsky to throw Parks' pocketbook down the trash chute. After he did so, Lipsky joined Pacelli, who was standing with his wife Beverly. Pacelli told Beverly to examine his and Lipsky's clothes for blood. Assured that there was none, Pacelli instructed her to gather up cleaning equipment to clean the car. She did so, handing it to Lipsky. Pacelli then told her to remove any "grass," "coke" and money from the apartment. He and Lipsky left, got back in the car and drove to another area near the water, where Lipsky scrubbed the blood from the right front seat and rug area of the car. At the same time, Pacelli discarded the four empty gasoline cans into the water. Then, ridding themselves of the cleaning equipment, they returned to Pacelli's apartment, where Lipsky bedded down on the living room rug and Pacelli walked downstairs to talk with Abbe Perez. (Tr. 259-64).**

Lipsky awoke at mid-day to an argument between Pacelli, his wife Beverly, and her sister Barbara. The women told Pacelli that they had used the car, had found blood in it and complained that they had to spend an hour cleaning it. Pacelli decided to return the car to the rental agency. Lipsky and Beverly got in the car and followed a car driven

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* At low tide on March 13, 1972 the knife was found buried several inches under the mud in the bay area off Cameron's Boat Yard in New Rochelle, two blocks from Pacelli's residence. (Tr. 812-14, 817, 820-23, 1247, 1250-54; GX 4).

** Abbe Perez was Pacelli's other narcotics partner and a boyfriend of Pacelli's sister-in-law, Barbara Jalaba. (Tr. 215, 263)

by Abbe Perez, who was accompanied by Pacelli and Barbara Jalaba. They drove to an Econo-Car outlet on Westchester Avenue in the Bronx, where Beverly returned the car and paid the $300 bill in cash. (Tr. 264-66)*

After returning the car, Lipsky and Beverly joined the others in Perez's car. They then drove Lipsky home to Manhattan, where Pacelli told Lipsky to rent another car for him. Lipsky did so, renting a similar car at an Avis rental agency in Manhattan and giving it to Pacelli that night. (Tr. 267-69)**

Either on Friday or on Saturday evening, February 5, Lipsky and Pacelli met for dinner at the Akasaka Restaurant in Manhattan. Pacelli expressed satisfaction at his decision to kill Parks, confiding that he believed that Parks would have been an important witness against him at his trial, which he had learned from his lawyer was to commence the following Tuseday, February 8, 1972. (Tr. 270-71)

On February 8, Pacelli and his co-defendants went to trial before Judge Pollack on the narcotics charges. That evening, Pacelli and Lipsky met with Al Bracer and Abbe Perez; Pacelli instructed them to tell Frank Serrano to leave New York "or he is going to get the same thing that happened to the girl." (Tr. 277-79)***

Shortly after that meeting with Bracer and Perez, Parks' corpse was publicly identified. Lipsky again met

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* Beverly Jalaba had originally rented the car, a 1972 Plymouth Fury III, on January 18, 1972, using her maiden name and a Southfield, Michigan address. Although due to be returned on January 25, 1972, the car was checked in on February 4 at 4 p.m. (GX 10; Tr. 773, 787)

** Lipsky rented the car, a 1972 Plymouth, on February 4, 1972 at 5:32 p.m. (GX 21)

*** Frank Serrano is the individual Parks identified to the Grand Jury as the person who gave the box of money to Pacelli at her apartment. (GX 2)

with Bracer and Perez, and they gave Lipsky $1,000 with instructions to flee to Florida. On February 11, Lipsky left for Florida, where he remained until March 2.* Upon his return to New York, Lipsky was stopped and subsequently arrested by officers of the Nassau County Police Department, after confessing to the Parks murder. (Tr. 279-80, 284-85)**

On February 16, Al Bracer returned to the Econo-Car outlet on Westchester Avenue, Bronx, and rented the same car in which Parks was murdered. The car was found totally in flames two days later in a desolate area of Fairfield, New Jersey. (Tr. 851-55).***

The Defense Case

Pacelli did not testify but did call a number of witnesses to testify on his behalf.

Ralph Calobrisi, a New Yirk City Police Officer, testified that during February, 1972 he was moonlighting as a rental agent at the Econo-Car outlet on Westchester Avenue,

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* While in Florida staying with friends, Lipsky cryptically boasted to one of them: "Nothing upsets me. I saw him stab her and I threw the match." (Tr. 745-50)

** Lipsky twice confessed on March 2 to helping Pacelli murder Parks, each time giving extensive and minute details concerning the murder. (GX 7, 8)

*** Fifteen minutes before the car was discovered in flames, it was observed in the same area apparently abandoned with a three-gallon can of gasoline in the front seat passenger side and another three-gallon can in the rear. (Tr. 845-49) A chemical analysis of the car's charred interior was conducted on March 6, 1972. On the underside of the carpet lifted from the right front passenger side of the car, positive reactions to a benzidine solution were obtained in two small areas which the chemist interpreted as indicative of but not conclusive for the presence of blood. In addition, gasoline was detected throughout the charred interior of the car. (Tr. 908-29)

Bronx. On February 16, 1972 Calobrisi recalled that Al Bracer, who Calobrisi knew as a frequent customer, came in and asked to rent "a large car." Calobrisi testified he made out the necessary papers, called the garage, and had a car delivered for Bracer. Calobrisi identified the car delivered to Bracer as the Plymouth Fury previously rented by Pacelli's wife on January 18. On cross-examination, Calobrisi stated he did not select that particular car for Bracer, but he testified that he had no knowledge whether Bracer himself might have personally arranged for that precise car out of the 30 or 40 cars then available on the lot. Further, Calobrisi testified that he did nothing about contacting Bracer after the car was reported burned in New Jersey. (Tr. 1082-1105)*

Frederick Hodge, a garageman at the Econo-Car outlet on Westchester Avenue in February, 1972, testified that customers did not select the rental car from the garage. The practice was that the rental agent requested the car and the garageman delivered it. (Tr. 1457-60)

Richard Roche, a master harbor pilot on Long Island Sound, testified that on January 28, 1975 he charted the actual low tide and measured the water depth which existed on February 4, 1972 in the area of New Rochelle bay fronting on Cameron's Boat Yard. Based upon his calculations, Roche testified that by 7:30 a.m. on February 4 the tide had receded beyond the area where the murder knife had been found, leaving a mud flat. (Tr. 1427-30). On cross-examination, Roche conceded that at 6:00 and 6:30 a.m. on February 4 the tide was above the area where the murder

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* Calobrisi's admissions that he had made no effort to contact Bracer about the car despite the fact that Bracer was a regular customer, that the car was overdue, that it had been reported burned, and that he himself had rented that car to Bracer was in stark contrast to his direct testimony that he invariably placed telephone calls to customers whose rental cars were overdue. (Tr. 1083-87, 1101)

knife had been found. He further conceded that the natural changes to the harbor in three years caused by winds and tide could affect his calculations of the water line by at least a half hour either way, thus warranting an inference that the waterline, on February 4, 1972, at 7 a.m., or even later, could have been above the area where the knife was subsequently discovered. (Tr. 1427-29, 1432-37; GX 18)*

Alexander S. Weiner, Chief Medical Examiner for the City of New York, testified that the benzidine test utilized by the Nassau County laboratory technicians in analysing the murder knife and the murder car for blood traces is useful only as a preliminary, not a conclusive, test for blood and, in Dr. Weiner's opinion, is not sufficiently precise to interpret positive reactions to stains as even indicative that such stains contain blood.** Dr. Weiner further testified that he visually inspected the rugs lifted from the murder car but found no "worthwhile stains" for testing.***

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* It was stipulated that the murder occurred no later than 5:20 a.m. Lipsky testified it occurred about 5:00 a.m. Lipsky also testified that it was about 7:00 or 7:30 a.m. on February 4 when he and Pacelli returned to the bay the second time to clean the blood from the car. (Tr. 261). In an effort to discredit Lipsky's testimony in this regard, Pacelli's private investigator testified that he made the trip from Massapequa, Long Island to Pacelli's residence in New Rochelle on December 29-30, 1974 measuring the mileage at 67 miles and clocking the travel time at 82 minutes. (Tr. 1372-79)

All of this evidence was designed to impeach Lipsky's testimony that, when he threw the murder weapon into New Rochelle bay at Pacelli's direction, it landed in the water. Pacelli argued from this that the knife was planted by the Nassau County Police Department.

** Dr. Weiner conceded on cross-examination that in 9 of 10 cases in his experience a stain reacting positively with a benzidine solution proved upon further testing to contain blood. (Tr. 1318)

*** Dr. Weiner conceded that his visual inspection was not only casual, but that he only looked at a portion of the rug, not the entire rug, before forming his opinion that the rug was unworthy of chemical examination. (Tr. 1314-15, 1322)

Finally, Dr. Weiner testified about an experiment he conducted in conjunction with Pacelli's private investigator, John McNally. McNally acquired three K-55 knives similar to the murder weapon,* soaked them in human blood supplied by Dr. Weiner, allowed the blood to dry, and then dropped them into the bay at Cameron's Boat Yard. A few weeks later, McNally retrieved the knives and delivered them to Dr. Weiner. Dr. Weiner chemically tested each of the knives for evidence of blood traces and found none. (DX NN, OO, PP; Tr. 1308-12, 1333-41).**

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* McNally also testified that K-55 knives are not manufactured with silver handles but with black-painted handles, and that in his experience as a former police officer he had seen 100 such knives, all of which were black-handled. (The handle of the murder weapon was worn silver, showing only a few remaining traces of black paint.) On cross-examination, McNally had to admit that the black paint on the handles of the K-55 knives he had purchased a month earlier was already peeling away, leaving a silver finish. (Tr. 1383-84) In rebuttal, the Government called Frank De Marco, a New York City Detective, who testified that in making arrests he had confiscated a number of K-55 knives, the handles of which were in varying conditions of silver, black, and partially silver and black, depending upon the degree to which the black paint had peeled away. (GX 31; Tr. 1498-1500).

McNally further testified that the K-55 knives used in the experiment were each rusted when he retrieved them from New Rochelle Bay. Unlike the murder weapon which was found under inches of mud, McNally admitted the experimental knives remained exposed on the surface of the mud, where he had gently placed them in the water. (Tr. 1337-44, 1385)

** The purpose of this particular evidence was to contradict the testimony of Gerard Jetter, the Nassau County Laboratory Technician who the defense called to testify that he had chemically analyzed the murder weapon in March, 1972 using a benzidine solution and received a positive reaction on a small stain, which he interpreted as indicative but not conclusive proof of the presence of blood in the stain. (Tr. 1108-17). (Jetter testified for the Government at Pacelli's first trial). In its efforts to convince the jury that the murder weapon was a fabrication, the defense also called Raymond Book, a Detective in the Nassau County Police Department, to testify to his conclusion in a report written on

[Footnote continued on following page]

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Significantly, Pacelli was unable to offer in his defense any evidence materially contradicting Lipsky's testimony about the events of the Parks murder. Nor was the defense able to offer the jury any rational explanation of the Parks murder, other than Lipsky's version, despite the passage of three years and two full-scale trials.*

ARGUMENT

POINT I

The Trial Court Did Not Limit Unduly The Cross-Examination And Impeachment Of Barry Lipsky.

Notwithstanding the two and one-half days devoted exclusively to the cross-examination and impeachment of Lipsky,** Pacelli complains of three instances in which Judge Stewart purportedly improperly restricted his counsel from conducting additional cross-examination of Lipsky. Pacelli was afforded especially wide latitude in cross-examining

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March 9, 1972, after Book had supervised a search of the water basin at Cameron's Boat Yard for several days, that the murder weapon was not in the area Lipsky indicated he had thrown it. In explanation, Book testified that in fact the murder weapon was not discovered in the area Lipsky had indicated but was found by Detective Walker under several inches of mud some feet beyond the area indicated by Lipsky at a location Book and his crew had not previously searched. (Tr. 1233-71)

* Pacelli's efforts in his brief to undermine Lipsky's testimony detailing the events of the murder, and the aftermath, merely emphasizes this inability. (Pacelli Brief, pp. 7-11)

** Lipsky's cross-examination comprised almost 400 pages of transcript; his direct examination, approximately 100 pages (Tr. 213-736). The wide latitude afforded Pacelli's counsel in cross-examining Lipsky can best be evaluated by a comparison with Lipsky's cross-examination at the Sperling trial by ten defense counsel, which also comprised 400 pages of transcript. *United States* v. *Sperling*, 506 F.2d 1332, 1334 (2d Cir. 1974), *cert. denied*, — U.S. —, 43 U.S.L.W. 3474 (March 3, 1975).

Lipsky to impeach his credibility and it was not error for Judge Stewart to exercise his unquestioned discretion to reasonably limit cross-examination by imposing each of the three restrictions here. See *United States* v. *Turcotte*, Dkt. No. 74-2380 (2d Cir., April 17, 1975) slip op. at 2967; *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973); *United States* v. *Blackwood*, 456 F.2d 526, 530 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972); *United States* v. *Eskow*, 422 F.2d 1060, 1070 (2d Cir. 1970), *cert. denied*, 398 U.S. 959 (1970).

(1) Nunziata's testimony did not establish perjury by Lipsky against Pacelli and was properly excluded.

The first restriction attacked by Pacelli is Judge Stewart's refusal to permit cross-examination of Lipsky about his testimony against Pacelli in an earlier narcotics trial that in September, 1971, Pacelli sold cocaine to Valentine at the Yellowfingers Restaurant, using Lipsky as the courier. That testimony, Pacelli contends, falsely implicated Pacelli, and Lipsky's perjury could have been proved by the admission into evidence of the recorded testimony of Joseph Nunziata, a deceased New York City detective. The contention is without merit, since Nunziata's recorded testimony was not admissible, and in any event, did not significantly contradict Lipsky's testimony that Pacelli was with Valentine and Lipsky inside Yellowfingers.

Lipsky's previous testimony was at a trial in June, 1972 where Lipsky testified against Luis Lombardero, a/k/a Valentine, and Pacelli. At that trial, at which Pacelli was convicted,* Lipsky testified that on September 28, 1971, he

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* Pacelli's conviction was vacated upon consent of the Government, when tape-recordings made by Lipsky's counsel, Walter Gwynn, were disclosed revealing Lipsky had falsely testified at that trial that he knew of no understanding with the Government that he would not be prosecuted.

and Pacelli were seated at a table in Yellowfingers Restaurant in Manhattan awaiting the arrival of Valentine, to whom Pacelli was to sell cocaine. When Valentine arrived, Valentine and Lipsky walked away from the table and Valentine handed Lipsky keys to an automobile, which Lipsky drove to his 1420 Third Avenue apartment. There, Lipsky packaged up cocaine, stashed it under the seat of Valentine's car and returned to Yellowfingers Restaurant, where he rejoined Pacelli and Valentine. Lipsky returned the keys to Valentine and Valentine left (A. 895-911).

Nunziata's previous testimony was given in February, 1972 at the trial of Valentine.* Nunziata there testified that on September 28, 1971, he conducted mobile surveillance of Valentine. Nunziata testified he observed Valentine leave his car and enter Yellowfingers Restaurant, where he briefly met with an unknown male (Lipsky) and handed him something. The male then left Yellowfingers, and Nunziata followed him. The male drove to an apartment building at 1420 Third Avenue and later returned to Yellowfingers, where Nunziata testified the male disappeared into the restaurant. Nunziata testified that the next thing he observed was Valentine leaving Yellowfingers ten minutes later (A. 918-26).**

Judge Stewart excluded this evidence based principally upon his finding that Nunziata's testimony was not proof that Lipsky's testimony about the same incident falsely implicated Pacelli. That finding was plainly not erroneous.***

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* A mistrial was declared when the jury failed to reach a verdict on Valentine. Valentine was later retried in June, 1972, with Pacelli, whose involvement had been discovered after Valentine's first trial.

** Nunziata's testimony about his later observations is omitted from Pacelli's appendix.

*** In denying Pacelli's post-trial motion for a new trial based upon the exclusion of this evidence, Judge Stewart made the following finding: "We cannot conclude from this prior testi-

[Footnote continued on following page]

Clearly, Nunziata's testimony itself poses no direct contradiction to Lipsky's testimony that Pacelli was present inside Yellowfingers. Nunziata's testimony was directed solely against Valentine, the single defendant then on trial. The questions and answers reveal that his testimony was not intended to establish even the identity of the then unknown male Valentine met (Lipsky) or, more importantly, whether Valentine met with other unknown males inside Yellowfingers. And, in fact, Nunziata's testimony does not itself indicate that he observed, or could have observed, anything occurring inside Yellowfingers.* Indeed, no showing has been made that Nunziata would have known who Pacelli was even if he had seen him. Given the tenuous nature of this extrinsic evidence, Judge Stewart did not err in excluding it in toto.** See *United States* v. *Kahn*, 472 F.2d 272, 279 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *Corey* v. *United States*, 346 F.2d 65, 67 (1st Cir.), *cert. denied*, 382 U.S. 911 (1965).

Judge Stewart's exclusion of Nunziata's testimony may also be sustained on the ground that Nunziata's testimony

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mony and in the absence of Nunziata himself that Pacelli was not in fact at the restaurant for at least some of the time in question. Accordingly, we find that the defendant's offer to prove Lipsky's prior false testimony is not supported by the excerpts of testimony upon which he relied." (Memorandum Decision dated March 11, 1975, pp. 2-3).

* Nunziata's testimony indicates that he observed little, if anything, of the occurrences inside the restaurant. He testified, for example, that the male "disappeared" into Yellowfingers and he observed nothing else until Valentine emerged from Yellowfingers ten minutes later and left.

** Pacelli's suggestion in his brief that the admission of this evidence by Judge Pollack accounts for Pacelli's acquittal by the jury on three of six counts at the trial of *United States* v. *Mallah* is at odds with this Court's observation that Pacelli was acquitted on those counts for lack of any evidence corroborating Lipsky's testimony on those counts. *United States* v. *Mallah*, *supra*, 503 F.2d at 978. It is also worth noting that the admission of this evidence at that trial obviously did not deter the jury from convicting Pacelli on the other counts.

was inadmissible hearsay evidence. Recorded testimony of an unavailable witness is admissible only if the testimony offered was given at a trial which involved the same issue for which the testimony is being offered. See *United States* v. *Bell*, 500 F.2d 1287, 1290 (2d Cir. 1974); *Lyon* v. *United States*, 413 F.2d 186, 189 (5th Cir. 1969). *See generally* McCormick, Evidence, § 257 (2d ed. 1972) V. Wigmore, Evidence §§ 1386-87 (1974). Unquestionably that essential condition of admissibility is lacking here. When Nunziata testified, only Valentine had been indicted for the Yellowfingers transaction, and the transcript of that testimony makes clear that Nunziata was not questioned to determine whether Pacelli was present inside Yellowfingers, a fact of no relevance at the time Nunziata testified. And when Pacelli was later indicted and tried in June, 1972, along with Valentine for that offense, Nunziata was not available to testify. Thus, Nunziata's testimony was inadmissible to establish that Pacelli was not in Valentine's company inside Yellowfingers restaurant.*

Even assuming that Nunziata's testimony was competent circumstantial evidence that Pacelli was not inside Yellowfingers, contrary to Lipsky's direct testimony that he was, its exclusion was justified to assure that the trial would not be sidetracked by an involved effort to prove perjury by Lipsky as to an incident wholly irrelevant to the offenses being tried. *United States* v. *Kahn, supra,* 472 F.2d at 279; *United States* v. *Bowe*, 360 F.2d 1, 16 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966). That an involved dispute on this collateral issue was not an unlikely prospect is evi-

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* The fact that the Government called Nunziata as a witness to testify at Valentine's trial about the events at Yellowfingers does not affect the inadmissibility of that testimony at the trial below, since the Government's status as a party at the Valentine trial did not invest it with a motive to question Nunziata about the presence or absence of Pacelli at the restaurant, which was the issue on which the testimony was offered below. See *Lyon* v. *United States, supra,* 413 F.2d at 189.

dent from the fact that Nunziata witnessed the events at Yellowfingers while on a surveillance team, which included Louis D'Ambrosio, a former New York City Detective.* The events had also been testified to by Valentine.** Judge Stewart acted well within his discretion in excluding all such evidence, lest the trial be enmeshed in calling witnesses to explain Nunziata's testimony and thereby resolve this disputed issue of Lipsky's alleged perjury.

Recognizing that the alleged perjury, even if proven, would be cumulative, since the jury was otherwise possessed of abundant evidence of Lipsky's numerous incidents of lying and perjury,*** *e.g.*, *United States* v. *Blackwood*, *supra*, 456 F.2d at 530, Pacelli endeavors to shore up the claimed significance of Nunziata's testimony arguing that it consti-

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* D'Ambrosio testified in the June 1972 trial of Valentine and Pacelli that he conducted surveillance of Valentine's car, not Yellowfingers. At that trial he was not asked and his testimony does not reveal whether Nunziata or anyone conducted surveillance of Yellowfingers or was able to observe occurrences inside Yellowfingers. See *United States* v. *Vincent Pacelli*, 72 Cr. 664 (Trial transcript, pp. 39-44).

** Valentine testified at the *Sperling* trial in his own defense that he had accidently met Lipsky at Yellowfingers on the evening of September 28, 1971, and temporarily loaned Lipsky his car to drive to his apartment for a change of clothes. Valentine testified Pacelli was not there. Judge Stewart doubted the reliability of the testimony of Valentine, whom Pacelli did not offer to call as a witness, merely citing his testimony as support in his post-trial motion for a new trial based upon the exclusion of Nunziata's testimony. (Memorandum Decision, dated March 11, 1975, p. 2).

*** As recounted in Pacelli's brief, in addition to Lipsky's proven false testimony at the June and December, 1972 trials; Lipsky admitted to giving perjured testimony before a federal grand jury in Florida in 1970. In addition, Lipsky admitted to an untold number of lies to federal and state judges, to agents of the Federal Bureau of Investigation, to probation officers, and to a variety of victims of illegal schemes participated in by Lipsky. (Pacelli Brief, pp. 11-12).

tuted the sole evidence available to show that ". . . the witness has given false testimony, for the same prosecutor's office, against the same defendant, concerning the same matters about which he testified for the prosecution in the case at hand . . ." (Pacelli Brief, p. 23). The argument is specious.

There was direct evidence available to show Lipsky had testified falsely against Pacelli. Pacelli was a defendant in both the June and December, 1972, trials at which Lipsky falsely testified that he knew of no understanding with the Government that he was immune from federal narcotics prosecutions. Counsel for Pacelli cross-examined Lipsky about this false testimony at length, and Lipsky admitted his testimony was false, explaining that he confused the questions at both trials as relating to his Nassau County murder prosecution (Tr. 341-46, 351-64).

Allegedly for tactical reasons, Pacelli's counsel refrained from revealing to the jury that Pacelli was a defendant at those trials. That he did so, however, does not eliminate the fact that Pacelli had available this direct evidence that he was the victim of Lipsky's false testimony at those trials. Moreover, counsel's alleged reason for refraining from disclosing Pacelli's status as a defendant in those trials, because he was unable to prove Lipsky's false testimony was perjury without the tape-recorded telephone conversation between Lipsky, his attorney, Walter Gwynn, and Assistant United States Attorney Gerald Feffer, is disingenuous* (Pacelli Brief, pp. 26-27). Lipsky's explanation at the trial below for his false testimony could have been impeached by his earlier admission at the *Sperling* trial that his false testimony was not the result of confusion. *United States* v. *Pacelli, supra,* 491 F.2d at 1119 n. 9. See *United*

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* The absurdity of this alleged reason is further shown by the Government's arguments that the exclusion of testimony about Mr. Feffer's statements in that telephone conversation was not error. *Infra* at 23-27.

States v. *Sperling, supra*, 506 F.2d at 1332. Since Pacelli was a defendant represented by counsel at the Sperling trial, he cannot be heard to complain that he was unaware of Lipsky's contradictory testimony.* The availability of this direct evidence that Lipsky had twice testified falsely against Pacelli eliminates any genuine claim that Judge Stewart erred in excluding the much less direct evidence of Lipsky's alleged perjury concerning the Yellowfingers incident. See *United States* v. *Coughlin*, Dkt. No. 74-2391 (2d Cir., April 15, 1973), slip op. at 2902-03.**

Even if the Yellowfinger's evidence revealed that Lipsky falsely implicated Pacelli in a narcotics transaction, moreover, Pacelli's claim that it would have greatly undermined Lipsky's trial testimony about working with Pacelli in narcotics is dubious. Lipsky's testimony in this regard was corroborated by Susan Weyl, who testified at trial that Pacelli and Lipsky used her apartment in November and December 1971 as a stash for storing and diluting heroin and cocaine (Tr. 1023-26). Significantly, when making its offer of proof with respect to Miss Weyl's testimony, the Government affirmatively suggested that defense counsel recall Lipsky and re-offer Nunziata's testimony in response to his expressed intention to do so, if Weyl's testimony were allowed (Tr. 1020-21). No such effort was thereafter made.

Pacelli's further argument that he was entitled to prove

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* Pacelli's case was severed from the trial but not until the close of the Government's direct case, after Lipsky had testified.

** The jury also had before it direct evidence that Lipsky's testimony at trial that he was employed by Pacelli in the narcotics business contradicted his earlier statements in Nassau County that he was not so employed. Specifically, in his March 2 confession to the Parks murder, Lipsky stated that he was never involved in criminal activity with Pacelli, other than assisting in the murder. Lipsky was cross-examined about this clear inconsistency, which was of direct value in impeaching Lipsky's testimony at trial that he was employed by Pacelli in the narcotics business.

Lipsky's alleged perjury as evidence of Lipsky's specific bias against Pacelli is equally specious. Far more direct evidence of Lipsky's specific motive in testifying against Pacelli was before the jury. Lipsky admitted to the jury that he confessed to the murder in Nassau County believing that Pacelli would be indicted for the murder and he would "get off relatively easy" by testifying against him (Tr. 608-09). In addition, the jury had before it Lipsky's statement in a letter to his attorney that the Government wanted him "to hand them Pacelli's head on a silver platter . . ." (Tr. 469). No additional evidence was necessary to apprise the jury of Lipsky's particular motives in testifying against Pacelli.*

(2) Evidence that an Assistant United States Attorney allegedly knew of Lipsky's false testimony at two trials was properly excluded.

Stripped of its accusatory and reckless verbiage, Pacelli's next contention is that the trial court erred in precluding cross-examination and extrinsic evidence to show that Assistant United States Attorney Gerald Feffer allegedly permitted Lipsky to falsely testify at two trials in June and December, 1972, that he had no promise of immunity from the Government. There was no error.

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* Pacelli's claimed need of additional evidence to show Lipsky's specific bias in testifying against Pacelli is further undermined by his complete failure to utilize Lipsky's statement in a letter to Robert Morvillo, former Chief of the Criminal Division in the United States Attorney's Office, that Lipsky was eager to testify for the Government against Pacelli. *United States* v. *Pacelli, supra,* 491 F.2d at 1118. On that appeal, which reversed Pacelli's conviction on the basis of the Government's failure to disclose that letter, Pacelli had argued that the letter was crucial impeaching material because Lipsky "implies throughout the letter that virtually his only aim in life is to help the Government convict Pacelli." (Pacelli Brief, p. 26, *United States* v. *Pacelli, supra.*)

At various stages of the trial below, Pacelli's counsel sought permission from Judge Stewart to endeavor to prove that Lipsky's false testimony that he had not been promised immunity from federal prosecution was preceded by a tape-recorded telephone conversation in which Mr. Feffer assured Lipsky's counsel, Walter Gwynn, that Lipsky had complete immunity, which Gwynn related to Lipsky. The purpose of that evidence, Pacelli here claims, was to show that Lipsky perjured himself at both trials and that Feffer suborned that perjury.

Cross-examination and extrinsic evidence concerning Mr. Feffer's statements in that April, 1972 telephone conversation were not at all essential to establish that Lipsky's testimony in June and December about his lack of immunity was false. Lipsky admitted at trial that Gwynn told him in that April telephone conversation that the Government had promised not to prosecute him for anything—that Lipsky had "complete transactional immunity" (Tr. 321-26). He further admitted that his contrary testimony in June and in December, 1972, was false. Although Lipsky testified at the trial below that he confused the questions asked in those trials as relating to his Nassau County murder prosecution, the Government has already noted previously that Pacelli had available contradictory admissions by Lipsky that he was not confused.* Testimony by Lipsky regarding Mr. Feffer's statements to Gwynn in that telephone

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* Lipsky testified at the trial below that the questions asked him in those trials about any understandings with the Government were clear, but that he confused them in his own mind as relating to his then pending first degree murder prosecution in Nassau County (Tr. 353-58). Given that admission and explanation by Lipsky, and Lipsky's admission at the Sperling trial that he was not confused, Pacelli's assertion that it was essential in order to establish Lipsky's perjury to prove that Mr. Feffer, in addition to the trial court and defense counsel, had asked Lipsky the questions about any understanding with the Government is frivolous.

conversation about Lipsky's immunity, or the taped conversation itself, were simply immaterial and cumulative. Judge Stewart's ruling excluding that evidence was well within his discretion, as this Court expressly held in *United States* v. *Sperling, supra*, 506 F.2d at 1332 n. 11.

Pacelli's further claim that, notwithstanding Lipsky's admitted knowledge of his understanding and the falsity of his testimony, he was entitled to establish Feffer's participation in the April 1972 telephone discussions solely to prove that Mr. Feffer suborned Lipsky's perjury is simply a repetition of the kind of vitriolic claims of prosecutorial vindictiveness, already rejected by this Court in *United States* v. *Mallah, supra*, 503 F.2d at 981, as completely without merit. Mr. Feffer did not suborn Lipsky's perjury,* and there was no showing made below that he had. As the Government argued before Judge Stewart below, permitting Pacelli to question Lipsky to suggest misconduct by Mr. Feffer would require the Government to call a battery of witnesses, which it was prepared but understandably reluctant to do, to establish that Mr. Feffer did not know Lipsky was committing perjury and did not suborn perjury from Lipsky (Tr. 634-36).

To avoid the clear priority of Judge Stewart's exclusion of that evidence, Pacelli argues that Feffer's part in the conversation was independently relevant to show Lipsky's state of mind and belief that Mr. Feffer, and therefore the Government, would condone false testimony in trials involving Pacelli. Pacelli's counsel had more than sufficient evidence, including Lipsky's admitted false testimony at the 1972 trials to argue to the jury below, which he did, that Lipsky believed he could commit perjury with

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* Mr. Feffer was the Assistant United States Attorney prosecuting Pacelli at the trial in June, 1972, but he was not the Assistant United States Attorney prosecuting Pacelli at the trial in December, 1972.

impunity, since he had never been prosecuted for the false testimony he gave at either trial.*

Furthermore, Pacelli made the exact same argument on the appeal of his initial conviction in their case, claiming that the trial court erred in precluding his counsel from cross-examining Lipsky purportedly to show that Mr. Feffer, and Walter Phillips, the Assistant United States Attorney then prosecuting Pacelli for the Parks murder, knew of Lipsky's perjury at the June and December, 1972 trials. Pacelli argued that such cross-examination was legitimate to show that Lipsky had reason to believe that perjury against Pacelli was condoned by the Government. (Pacelli Brief, pp. 29-31, *United States* v. *Pacelli*, *supra*.) This Court dismissed the claims out of hand, noting the restrictions on cross-examination complained of were well within the trial court's discretion to impose. *United States* v. *Pacelli*, *supra*, 491 F.2d at 1120.

It is worth noting, moreover, that the claimed significance of this entire matter is tenuous in any event. Lipsky's testimony about the events of the Parks murder, and Pacelli's participation in that murder, is virtually identical to and was corroborated by the original confessions Lipsky gave in March, 1972, well before he had ever met Mr. Feffer or anyone in the United States Attorney's Office, and before he had any arrangements of any kind with the

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* In addition, the jury was aware that Lipsky had not been prosecuted for his admitted perjury before the federal grand jury in Florida, and that the Government had not sought to prosecute him for his deliberate misrepresentations to the court in Florida, to his Florida probation officer, or to the FBI agents investigating that case. Based upon all this evidence, which defense counsel recounted for the jury in his summation, it was forcefully argued that Lipsky had a license to lie, since he knew the Government would never prosecute him for perjury, because they never had (Tr. 1543-46).

Government.* See *United States* v. *Houle*, 490 F.2d 167, 170-71 (2d Cir. 1973).

(3) Precluding cross-examination of Lipsky about his alleged suggestion to Bruce Gordon to "burn" two witnesses was not error.

The final restriction on Lipsky's cross-examination claimed by Pacelli to constitute reversible error is Judge Stewart's refusal to allow his counsel to ask Lipsky if he had suggested to Bruce Gordon, in January 1972, that Gordon "burn" two witnesses to Gordon's illegal activities. The question sought to elicit evidence which was factually and legally irrelevant and was properly excluded.

At the very end of Lipsky's two and one-half days of cross-examination, defense counsel sought permission to ask Lipsky a question about an alleged suggestion he made to Gordon to burn two witnesses, purportedly to disprove Lipsky's testimony that his participation in the Parks murder was out of fear of Pacelli. Factually, there was no need for such impeachment since no evidence had been elicited nor any argument made that Lipsky assisted Pacelli in murdering Parks out of fear. Lipsky testified at trial that Pacelli simply asked him: "Barry, do you want to go with me?" And Lipsky responded that he did.** Equally important, legally Lipsky's motivations for

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* Pacelli's various assertions in his brief that Lipsky's account of the Parks murder changed while he was a witness in prosecutions conducted by Mr. Feffer is, characteristically, without factual support. To the extent questioned in this respect, Lipsky testified he did not discuss the murder when he commenced his cooperation in testifying about his extensive narcotics activities for Pacelli (Tr. 346).

** Lipsky admitted that he knew even before he was asked by Pacelli to come along, when Pacelli hit his hand and stated he

[Footnote continued on following page]

participating in the murder with Pacelli were irrelevant to the issue of Pacelli's guilt, *United States* v. *Blackwood*, *supra*, 456 F.2d at 531, as Judge Stewart observed in denying Pacelli's post-trial motion for a new trial upon this particular exclusion:

> "[T]here was no doubt at any time throughout the trial that Lipsky was a participant in the Parks' murder. He confessed to it. He admitted it on the stand. The question before the jury was whether Pacelli was a participant in that murder. We do not think that the proffered evidence had any bearing on whether Pacelli was a participant in the Parks' murder or whether he had a motive to murder her because she might have been a witness against him. (Memorandum Decision, p. 5).*

Relying on theories of admissibility first raised in his post-trial motion for a new trial, Pacelli here asserts that the question was a proper attempt to elicit evidence of a "'generic threat" by Lipsky suggesting his predisposition to burn witnesses. This theory of admissibility, like his previous theory of admissibility, is vulnerable to the precise reason for the exclusion of such evidence. Lipsky's predisposition to assist friends to burn witnesses is irrelevant to Pacelli's guilt.**

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knew what he had to do, that Pacelli planned to murder Parks (Tr. 698). Moreover, Lipsky admitted that Pacelli first asked Bracer to accompany him to murder Parks, and Bracer declined without incident (Tr. 229).

* Pacelli's claim that Lipsky's suggestion to Gordon would be admissible at a trial of Lipsky for the Parks murder is precisely the point. It is relevant to Lipsky's guilt, an issue on which the Government more than met by other evidence a burden that was the Government's, not Pacelli's.

** It is likewise irrelevant whether Lipsky's participation in the murder was as a principal or agent, or in Pacelli's terms a "marionette," especially since Pacelli's counsel virtually conceded that Lipsky did not murder Parks alone, but with someone else.

Similarly, Lipsky's alleged suggestion to Gordon cannot be likened to Lipsky's testimony at trial that a few days after the Parks murder Pacelli told Bracer and Perez to tell Frank Serrano to leave New York or "he is going to get the same thing that happened to the girl,"* nor to the Government's inquiry of Pacelli at the earlier trial of this case about his alleged threat to shoot the knee caps off anybody who double-crossed him,** since the evidence sought by the latter questioning bore on Pacelli's guilt and intent to murder Parks to prevent her from testifying.*** This entire contention simply reflects a confusion regarding the fact that the defendant on trial was Pacelli,. not Lipsky. See *United States* v. *DeSapio*, 456 F.2d 645, 648 n. 1 (2d Cir. 1972).

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* Lipsky's testimony about this particular conversation was also admissible to explain Bracer's conduct in re-renting and burning the murder car, and his and Perez' conduct in providing $1,000 to Lipsky, with instructions to flee to Florida.

** This Court held that the question asked of Pacelli on cross-examination, although presenting a close question, was not reversible error, since it could be construed as seeking evidence of a generic threat bearing on Pacelli's intent to prevent Parks from testifying against him. *United States* v. *Pacelli*, *supra*, 491 F.2d at 1120.

*** Contrary to the implication in his brief, Pacelli's counsel made no offer of proof or even intimated that he intended to call Bruce Gordon, an associate of Pacelli, to contradict Lipsky's testimony should Lipsky deny the alleged statement. Had he done so, however, the trial would have become embroiled in an examination of Gordon and Susan Weyl with respect to Gordon's alleged physical assault upon Weyl for being a "stool pigeon," after her testimony at previous trials (Tr. 1019), thus confirming Judge Stewart's decision below excluding the question so as not to "unduly sidetrack the main issues in the case." (Memorandum Decision, p. 6).

POINT II

The Trial Court Did Not Abuse Its Discretion By Excluding Psychiatric Testimony Concerning Lipsky's Credibility Or By Refusing To Order A Psychiatric Examination Of Lipsky.

Pacelli contends that it was reversible error for the trial court to refuse to allow Dr. David Abrahamsen to give psychiatric testimony that Lipsky had a psychopathic mental disorder which affected his ability to tell the truth. Judge Stewart's decision was not an abuse of discretion, since expert testimony, particularly of the sort here offered, was hardly necessary to assist the jury in assessing the facts and circumstances bearing on Lipsky's credibility, including both Lipsky's mental condition and his obvious difficulties with telling the truth.

It is a settled principle that ". . . the District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling* v. *United States*, 418 U.S. 87, 108 (1974). (Citations omitted). The decision whether to permit psychiatric testimony to impeach the credibility of a witness is one committed to the discretion of the trial court and which will not be overturned unless manifestly erroneous. *E.g.*, *United States* v. *Barnard*, 490 F.2d 907, 913 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); *United States* v. *Butler*, 481 F.2d 531, 535 (D.C. Cir. 1973). Judge Stewart's decision below refusing to admit such testimony was made only after conducting an extensive preliminary hearing, which revealed that Dr. Abrahamsen's proposed psychiatric testimony that Lipsky's psycho-

pathic personality affected his credibility, would be, as Judge Stewart found, "of no use to the jury" (Tr. 1232).*

Taking issue with Judge Stewart's decision excluding that testimony, Pacelli asserts that it was error to deprive the jury of Dr. Abrahamsen's opinion that Lipsky's psychopathic personality rendered him unable to tell the truth if a lie served his own self-interest. The assertion neglects to mention several significant qualifications attached to his opinion, principal among which is Dr. Abrahamsen's retreat from the categorical form of the opinion to a formulation that it was "highly doubtful" and later "questionable" whether a psychopath can tell the truth under such circumstances (Tr. 1142, 1150, 1151). In addition, Dr. Abrahamsen testified that a psychopath is able to tell the truth when it coincides with his self-interest (Tr. 1150-51). Of more significance in terms of evaluating the alleged value, or lack of it, of Dr. Abrahamsen's opinion for the jury is that Dr. Abrahamsen's analysis hinged on the motion that a psychopath has a distorted perception of his own self-interest, but Dr. Abrahamsen never suggested that he had any way of determining Lipsky's self-interest, far less Lipsky's perception of his self-interest, or that he could tell the jury how to do so. Thus, with respect to an issue critical to the utility of his purported expert testimony, Dr. Abrahamsen had no ability to furnish the jury with evidence which would have given his analysis of Lipsky as a psychopath any meaning.

In the same vein, Dr. Abrahamsen admitted that he had no advantage over the jury in assessing whether Lipsky's

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* Undoubtedly a very different issue is presented where psychiatric evidence is available to establish a witness may be psychotic —a mental disorder characterized by a complete lack of ability to perceive reality. *Cf. United States* v. *Klein*, 271 F. Supp. 506-508 (D.D.C. 1967), *aff'd., Hamilton* v. *United States*, 433 F.2d 526 (D.C. Cir. 1970); *United States* v. *Daileda*, 229 F. Supp. 148 (M.D. Pa. 1964), *aff'd*, 342 F.2d 218 (3d Cir. 1965).

testimony about any particular event was true or false. That determination, Dr. Abrahamsen agreed, could be made only by examining all other relevant information bearing on the events about which Lipsky testified, assessing the probabilities of that testimony, and exercising common sense (Tr. 1182-85). That the jury was obligated to do, and competently could do, without the benefit of Dr. Abrahamsen's testimony.* *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962).

Moreover, in evaluating the validity of Dr. Abrahamsen's proposed testimony, it was not amiss for Judge Stewart to doubt the meaningfulness of its underlying premise—that Lipsky was a psychopath. Dr. Abrahamsen was apparently of the view that parents who read Little Red Riding Hood to their children are perhaps psychopathic, or at least sadists (Tr. 1165-66). Dr. Abrahamsen also suggested that Lipsky's signing a letter with the nickname "Wart" manifested some "sadistic" tendencies, though he assured the Court, in response to a question from the bench, that the Court's use of a nickname in writing letters to his aunt was of no psychological significance. Dr. Abrahamsen's explanation was that "[o]n selecting of the term, the name 'Wart' is to me quite strange. . . . I have an insight of what the name 'Wart' is" (Tr. 1167, 1173-76). In a similar vein, Dr. Abrahamsen attributed part of his diagnosis to the fact that Lipsky watched horror movies, but he declined to assert that any other person who watched horror movies was necessarily psychopathic (Tr. 1164-65). Similarly, Dr. Abrahamsen declined to assert categorically that parents who let their children watch Sesame Street

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* Dr. Abrahamsen conceded that the jury system, which pools 12 individuals of varying backgrounds and experience, was a sound system for deciding the issue of whether someone is being truthful or not (Tr. 1194).

on television were necessarily psychopaths, but he did not exclude the possibility (Tr. 1162).*

Eminently more valuable, however, in assessing whether Dr. Abrahamsen's psychiatric opinion of Lipsky as a pathological liar was valid is the obvious fact that the significant indicia underlying his asserted opinion rested upon Lipsky's veracity. For example, Dr. Abrahamsen's reliance on Lipsky's past cocaine habit as an "absolutely significant" factor in his determination that Lipsky was a pathological liar was based on his belief that Lipsky's assertions about prior frequent use of cocaine were truthful (Tr. 1177-79). Similarly, Dr. Abrahamsen expressed his belief in the truth of Lipsky's admissions of repeatedly lying, which lying he deemed significant to his conclusion (Tr. 1171-73). When cross-examined about this paradox, Dr. Abrahamsen lucidly explained: "Sometimes one has to believe certain things, but it throws a strange coloring over the man" (Tr. 1171). Indeed, Dr. Abrahamsen had to believe Lipsky for virtually every thing, significant or not, in arriving at his conclusion that Lipsky was a pathological liar, including, in addition to things already noted, Lipsky's admissions concerning the Parks murder, confidence schemes, swindles, narcotics trafficking, check forgeries, and stock frauds he had engaged in, as well as Lipsky's self-expressed violent temper, fondness for horror movies, nightmares and other silly behavior quirks (Tr. 1153-55, 1185-87).**

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* As Judge Stewart observed quite early in Dr. Abrahamsen's testimony: "It seems to me that what you are saying about psychopaths can apply to a lot of us or all of us." (Tr. 1143)

** Without further belaboring the point, the Government respectfully submits that most of Dr. Abrahamsen's testimony was devoid of meaningful content, and we urge the Court to read it in full (Tr. 1123-1232; Pacelli's Appendix 732-844). Sweeping assertions of psychiatric principle and diagnostic significance were abandoned or qualified into obscurity when challenged by the Government or questioned by the Court with the mildest

[Footnote continued on following page]

Secondly, even if Dr. Abrahamsen's expert opinion had been of more substance than it was, Judge Stewart would still have properly exercised his discretion in excluding it. Pertinent to this precise issue is the recent decision, *United States* v. *Barnard*, *supra*, where the Court of Appeals found no abuse of discretion in the trial court's exclusion of psychiatric testimony that a Government witness was a sociopath * who would lie when advantageous to do so. In reaching its conclusion, the Court observed:

> "Credibility . . . is for the jury—the jury is the lie detector in the courtroom. Judges frequently instruct juries about factors that the jury may or should consider in weighing the veracity of a witness. In this respect it can be said that judges assume that they have certain expertise in the matter, and that juries have less of that expertise than judges. It is now suggested that psychiatrists and psychologists have more of this expertise than either judges or juries, and that their opinions can be of value to both judges and juries in determining the veracity of witnesses. Perhaps. The effect of receiving such testimony, however, may be two-fold: first, it may cause juries to surrender their own common sense in weighing testimony; second, it may produce a trial within a trial on what is a collateral but still an important matter. For these reasons we, like other courts that have considered the matter, are unwilling to say when such testimony is offered the judge must admit it. 490 F.2d at 913.

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applications of fundamental common sense. Indeed, evasiveness and irritation on cross-examination—factors considered by Dr. Abrahamsen in diagnosing Lipsky as a psychopath—were as obvious in Dr. Abrahamsen's testimony as they were in Lipsky's, or, indeed, as they would be in the testimony of any witness facing a resourceful cross-examiner.

* Sociopath is a synonym for psychopath.

Both of the adverse effects foreseen by the Court in *Barnes* were foreseeable consequences of the admission of Dr. Abrahamsen's testimony here.

First, Dr. Abrahamsen's psychiatric evaluation of Lipsky as a pathological liar was based almost exclusively on facts fully presented to the jury as evidence impeaching Lipsky's credibility as a witness. For example, Dr. Abrahamsen apparently thought that the significant facts bearing on his conclusion that Lipsky is psychopathic were Lipsky's admitted crimes and criminal background (Tr. 1185-87),* his admitted cocaine use (Tr. 1177), his present use of prescription tranquilizers (Tr. 1197), his admitted incidents of throwing bathroom scales in Biscayne Bay and holding an unloaded gun to his brother's head (Tr. 1195), his expressions of violent temper to his mother and sister (Tr. 1195), his admitted instances of banging his head (Tr. 1198), and his admitted lies and perjury (Tr. 1197). Those of less significance to Dr. Abrahamsen, or of little significance, were Lipsky's admitted fondness for horror movies (Tr. 1161), his use of nicknames and a claw insignia (Tr. 1167), his selective memory (Tr. 1157),** and his alleged misunderstanding of the oath (Tr. 1201-06).*** Everyone of these facts concerning Lipsky was before the jury to consider in reaching its conclusion on Lipsky's credibility. Even Dr. Abrahamsen appear to have conceded, albeit reluctantly, that the jury could fully assess

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* It was Dr. Abrahamsen's opinion that the large proportion of criminals are psychopathic (Tr. 1186).

** Dr. Abrahamsen's opinion that Lipsky manifested a selective memory was based upon listening to Lipsky at trial testify without hesitation, except when examined by defense counsel, a fact explainable by Lipsky's preparation for direct and re-direct examination (Tr. 1157-59, 1168-70).

*** Dr. Abrahamsen's opinion was that Lipsky's response to the meaning of the oath, although correct, was "a little strange" and "impersonal" and could have been said better (Tr. 1201-06).

the factors upon which his diagnosis was based so far as they bore on Lipsky's credibility (Tr. 1189-94). Certainly in the absence of a manifest showing that the jury was incapable of understanding or appreciating the significance of these facts in assessing Lipsky's credibility, the trial court was warranted in excluding Dr. Abrahamsen's testimony to assure that the jury was neither misled in nor influenced to surrender the exercise of its function of evaluating Lipsky's credibility based upon, inter alia, all the impeaching evidence adduced before it. Expressing this fear in a different context, Judge Gurfein, speaking for this Court in *United States* v. *Bright*, Dkt. No. 74-2447 (2d Cir., May 21, 1975), which upheld the exclusion of psychiatric testimony that a defendant, although not psychotic, lacked the mental capacity to form the specific intent to commit the crime charged, observed:

> "In dealing with forensic psychiatry we must be humble rather than dogmatic. The mind and motivation of an accused who is not on the other side of the line under the *Freeman* test, is, by the judgment of experience, left to the jury to probe. The complexity of the fears and long-suppressed traumatic experiences of a lifetime is in the personality of all of us. All humankind is heir to defects of personality.
>
> To transmute the effect of instability, of undue reliance on another, of unrequited love, of sudden anger, of the host of attitudes and syndromes that are a part of daily living, into opinion evidence to the jury for exculpation or condemnation is to go beyond the boundaries of current knowledge. The shallower the conception the deeper runs the danger that the jury may be misled" (Slip op. at 3629).*

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* The psychopathic personality is a psychiatric concept about which there is little professional agreement. Lewis, Psychopathic Personality: A Most Elusive Category, 4 Psychological Medicine 133 (1974). Dr. Abrahamsen conceded the existence of such disagreement (Tr. 1210).

Lipsky's credibility was exhaustively exploded in the closing arguments on both sides, and Judge Stewart carefully instructed the jury before it retired to deliberate that Lipsky was an admitted accomplice whose testimony must be closely examined (Tr. 1650). Thus, the jury was instructed that Lipsky's testimony was suspect, and they were well informed, albeit not in psychiatric terms, of all the facts and circumstances that made it so.* That being so, it was clearly within Judge Stewart's discretion to rule out Dr. Abrahamsen's testimony for this reason alone. See *United States* v. *Butler*, 481 F.2d 531, 535 (D.C. Cir. 1973); *United States* v. *Benn*, 476 F.2d 1127, 1131 (D.C. Cir. 1972); *Gurleski* v. *United States*, 405 F.2d 253 (8th Cir.), *cert. denied*, 395 U.S. 977 (1969).

It is likewise evident, however, that Judge Stewart was warranted in excluding Dr. Abrahamsen's testimony to avoid a quite complicated and confused dispute over the collateral issue of the nature of Lipsky's mental condition and its affect uopn his credibility. Dr. Abrahamsen's testimony on *voir dire* itself took the better part of one trial day to complete. A careful review of that testimony reveals the potential for confusion and dispute which existed if that testimony were allowed before the jury. Equally important, Judge Stewart was aware that Lipsky had been examined previously by two psychiatrists who, unlike Dr. Abrahamsen, had found no evidence of any mental disease or defect and whose testimony could be sought in rebuttal (Tr. 1136; DX. HH).

In any event, any error in excluding Dr. Abrahamsen's testimony concerning Lipsky, if error there was, did not

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* The Government made no effort to pass off Lipsky as something other than he was, characterizing him both in its opening and closing arguments as a "contemptible human being" whose ability to lie was obvious (Tr. 1591-92). Of course, defense counsel was even less controlled in commenting on Lipsky, characterizing him among other things as a "professional con man," a "swindler," a "compulsive liar," and a "perjurer."

deprive Pacelli of a fair trial. Lipsky's testimony about the events of the murder, and Pacelli's involvement, was overwhelmingly corroborated by other witnesses and by documentary evidence. As previously stated, Pacelli was unable to offer any evidence to materially contradict Lipsky's testimony concerning the murder or to supply alibi or exculpatory evidence with respect to his involvement in the murder.* Nor was his counsel able to fashion any alternative theory which excluded Pacelli and still rationally explained the murder.** Obviously, Dr. Abrahamsen's proposed testimony could do nothing to alter the overwhelming proof of Pacelli's guilt for the Parks murder and its exclusion under such circumstances does not warrant a reversal. *United States* v. *Butler, supra.****

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* Clearly Lipsky's testimony did not lack for persons to contradict it. Pacelli's wife, his sister-in-law, the Bracers and Abbe Perez were all named by Lipsky as persons with first-hand knowledge of Pacelli's guilt in the matter.

** For example, Pacelli's counsel was completely unable to rationally explain the single incident of the burning of Pacelli's rented car on February 18, despite the fact that two witnesses were called by the defense to establish that the re-rental of that car by Bracer on February 16 was coincidental. In explanation of the burned car, defense counsel argued that "it was a fabrication of evidence; it was done to support Lipsky's story and for no other reason" (Tr. 1558). The defect in this explanation, as the Government pointed out to the jury, was that the car was burned two weeks before Lipsky was first taken into custody and confessed (Tr. 1585).

*** Pacelli also claims that Dr. Abrahamsen should have been permitted to testify for the limited purpose of explaining to the jury the effect of Lipsky's alleged drug dependency on his credibility. Although Dr. Abrahamsen testified that Lipsky's past use of cocaine and present use of prescription drugs was a significant fact in his conclusion that Lipsky was psychopathic, Dr. Abrahamsen's testimony does not indicate that drug use independently creates in an individual an inability to perceive reality or to tell the truth. The jury was otherwise fully informed of Lipsky's present and past use of various narcotic and

[Footnote continued on following page]

Pacelli separately contends that Judge Stewart committed reversible error by denying his applications to have Lipsky submit to a psychiatric examination. Like the law with respect to admissibility of psychiatric testimony, it is settled that the decision whether to order a psychiatric examination of a witness is a matter particularly within the discretion of the trial court. *United States* v. *Russo*, 442 F.2d 498, 503 (2d Cir. 1971). See *United States* v. *Gerry*, Dkt. No. 74-2100 (2d Cir., March 28, 1975); *United States* v. *Butler, supra; United States* v. *Skillman*, 442 F.2d 542 (8th Cir. 1971).

The short answer to Pacelli's contention here is that Judge Stewart clearly committed no error, since Dr. Abrahamsen, Pacelli's own witness, when specifically asked by the trial court if an examination of Lipsky would assist him in forming conclusions concerning Lipsky's mental condition, testified it would not (Tr. 1155).*

It is also clear, however, that Pacelli's pre-trial showing for a psychiatric examination was otherwise insufficient to require Judge Stewart to grant his application. Lipsky had already undergone a court-ordered mental examination by

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non-narcotic drugs and it was not error to exclude Dr. Abrahamsen's testimony on this limited issue. See *United States* v. *Butler, supra; Gurleski* v. *United States, supra.* Moreover, since Pacelli's offer of Dr. Abrahamsen's testimony below was far less limited than this argument suggests, Judge Stewart did not abuse his discretion in rejecting the testimony as offered, whatever might have been the proper course had the improper portions been excised from what Pacelli said below that he wanted to prove through Dr. Abrahamsen. *United States* v. *Marquez*, 462 F.2d 893, 895 (2d Cir. 1972); *cf. United States* v. *Kelly*, 349 F.2d 720, 759 (2d Cir. 1965).

* Dr. Abrahamsen so testified, even conceding that the American Psychiatric Association has expressed the opinion that psychiatric testimony should be based upon a psychiatric examination and not upon court room observation (Tr. 1180-81).

two psychiatrists who found him free of any mental disease or defect.* By itself, that fact justified denying Pacelli's application.** See *United States* v. *Gebhart*, 436 F.2d 1252 (8th Cir. 1971).

Pacelli's main additional support for the psychiatric examination of Lipsky were comments of his attorney and Assistant United States Attorney Feffer concerning Lipsky's apparent mental condition. Whatever else may be made of such statements as a layman's description of Lipsky's behavior two years before this trial, clearly such assessments of anyone's mental condition or behavior, even Lipsky's, are not sufficient indicia to mandate a trial judge to order a psychiatric examination. See *Carrado* v. *United States*, 210 F.2d 712, 721 (D.C. Cir. 1953). Given the fact that Lipsky had testified exhaustively in five earlier trials involving Pacelli and many others before four other District Judges—not to mention other proceedings not involving Pacelli—the absence of any substantial evidence to suggest mental illness in Lipsky makes clear the correctness of Judge Stewart's action here.

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* Both psychiatrists wrote reports. Their reports reflect that their conclusions were formed with knowledge of Lipsky's 1967 visits to psychiatrists, his past cocaine habit and his continued use of prescription drugs, the events of the murder, his criminal background, his nightmares about being murdered, and his incidents of striking his head against the wall. Pacelli's statement in his brief that the facts of the offense were not discussed in the examination is erroneous (Pacelli Brief, p. 41). Pacelli's assertion that "[o]ne can certainly be competent to stand trial without being a competent witness" (Pacelli Brief, p. 41; footnotes omitted) is a statement so preposterous as to expose the absurdity of his entire argument.

** Pacelli's suggestion in his brief that Lipsky's psychiatric examination in Nassau County, ordered by the Nassau County Court on motion of his attorney, inured to the benefit of the Government and made it unfair for the Government thereafter to oppose Pacelli's request for a psychiatric examination warrants no response.

POINT III

The Evidence Established Pacelli's Guilt For A Violation Of Section 241.

Reopening his previous unsuccessful challenge to the applicability of Title 18, United States Code, Section 241 to the murder of Parks, Pacelli contends that the evidence below failed to meet the Constitutional test laid down in *Screws* v. *United States*, 325 U.S. 91, 105 (1945), requiring proof of a specific purpose to deprive a citizen of "a federal right made definite by decision or other rule of law." Quite the contrary is true. The evidence adduced by the Government clearly established that Pacelli murdered Parks to prevent her from becoming a witness against him at his upcoming trial.

To the extent Pacelli bases his challenge on the lack of clear legislative or judicial expression that the right to testify at a federal trial is a Constitutional right protected by Section 241, this Court's previous decision provides the answer. Finding implicit in the Constitution a guarantee of the right to testify at a federal trial which is protected by Section 241, Judge Mansfield observed:

> "One of these [implicit Constitutional rights protected in Section 241] is the right to testify at a federal trial in response to a request or command of a federal district court. Our federal government has a particular interest in assuring a prospective witness that he or she will be free to respond by attending the trial of a federal indictment as a witness without being prevented from doing so by threats, molestation or force. Otherwise the foundations of federal justice would be undermined." (491 F.2d at 1116.)

See *Foss* v. *United States*, 266 F. 881 (9th Cir. 1920)*

Pacelli's remaining contention that the evidence presented below did not establish a specific purpose of the conspiracy was to deprive Parks of her federal right to testify at trial is likewise disposed of by this Court's previous finding: "It was her [Parks'] unwillingness to depart from the jurisdiction and Pacelli's own statement that 'she was to testify against him at trial' that provided his motive for his killing her." (491 F.2d at 1115).

Factually, there is abundant evidence in the trial below to support an identical finding here. When Lipsky first informed Pacelli at his apartment that agents were endeavoring to subpoena Parks for his federal trial, Pacelli immediately indicated his decision to murder her for "ratting" on him to the grand jury. Thereafter, accompanied by Lipsky, Pacelli confirmed his decision, having Lipsky purchase gas and pick up matches "to burn up her body." Pacelli then had Lipsky lure her out in the car, where he interrogated her about the box and her willingness to go away to Brazil or California. When Parks indicated she did not want to leave New York, he stabbed her to death and burned her body. The deed done, Pacelli later expressed his satisfaction in murdering Parks, ex-

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* Pacelli's citation to *United States* v. *Sanges*, 48 F. 78 (C.C. Ga. 1891), *writ of error dismissed*, 144 U.S. 310 (1892) for a contrary proposition is accurate but unavailing, since the Court's decision there is based upon a very restricted interpretation of Section 241's predecessor, an interpretation this Court rejected. Also, Pacelli's citation to *United States* v. *De Laurentis*, 491 F.2d 208 (2d Cir. 1974) does not bolster his challenge to the application of Section 241 in the instant case, since the right claimed to be within the protection of Section 241 in *De Laurentis* was derived from legislation enacted in 1947, almost 80 years after the original enactment of Section 241, legislation which this Court further found created a right envisioned by Congress to be protected exclusively by civil, not criminal, sanctions.

plaining to Lipsky that his federal trial was to commence in a few days and she would have been an important witness.

The exact same evidence which disposes of Pacelli's claims of deficient proof as to his specific intent in the conspiracy similarly disposes of Pacelli's claims that the evidence failed to establish that Lipsky shared that specific intent, since Lipsky was a participant in Pacelli's planning and execution of the murder and plainly understood Pacelli's expressed reasons for doing so.

Pacelli's final claim that the proof failed to establish Pacelli's knowledge of Parks' United States citizenship misinterprets the requisite elements of Section 241. Undoubtedly, proof that Parks was a United States citizen was a necessary jurisdictional element of the Section 241 offense. It was satisfied, however, by the stipulation read to the jury that Parks was a United States citizen. Further proof that Pacelli knew of that jurisdictional fact was not required.* Cf. *United States* v. *Feola*, — U.S. —, 43 U.S.L.W. 4405 (March 19, 1975)**

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* Were proof required to show Pacelli's knowledge of Parks' citizenship, the record below is surfeit with facts known to Pacelli which could warrant a finding that he knew of Parks' citizenship, not the least of which is his admission that he had known her for about 5 years (Tr. 882-83).

** Pacelli's reliance on *United States* v. *Mack*, 112 F.2d 290 (2d Cir. 1940) for the contrary argument is truly remarkable. Judge Learned Hand wrote that, for reasons fully applicable here, the holding of the case was:

> "We hold therefore that a person entertaining an alien prostitute is liable under § 402(2), Title 18 U.S. Code, 18 U.S.C.A. § 402(2), regardless of his knowledge that she is an alien."

POINT IV

There Was No Error In The Imposition Of Sentence On Pacelli.

Pacelli makes numerous claims of error regarding his sentence and the manner in which Judge Stewart imposed it. None of the claims has any merit, and most can be briefly disposed of.

Principal among Pacelli's claims—and a premise underlying virtually all of them—is the notion that the sentence of life imprisonment imposed on his conviction on Count One is excessive. While engaging in various forms of mathematical computation regarding parole, Pacelli omits what is really the single most significant factor—that he is eligible for a parole after serving fifteen years of a sentence of life imprisonment. Title 18, United States Code, Section 4202. Moreover, any reading of the record in this case discloses in searing detail what an evil and vicious act Pacelli was convicted of—the brutal premeditated murder of a young woman and the burning of her body for the sole purpose of preventing her testimony against him at his trial on narcotics charges. In addition to the other information in the presentence report, Judge Stewart was also confronted with the fact that the defendant before him had been one of the ". . . central figures within a large organization engaged in distributing heroin and cocaine in New York. . . ." *United States* v. *Mallah*, *supra*, 503 F.2d at 975. In our view, for these and numerous other reasons the sentence imposed was proper.* However, all of this is

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* While hardly conclusive, we think it appropriate to note that to our knowledge sentences of life imprisonment have, in recent times, been imposed only in four cases in this Circuit: *United States* v. *Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States* v. *Sperling*, *supra*; *United States* v. *Rivera*, Dkt. No. 74-2115

[Footnote continued on following page]

quite beside the point, because ". . . absent reliance on improper considerations . . . or materially incorrect information . . . a sentence within statutory limits is not reviewable." *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *Dorszynski* v. *United States*, 418 U.S. 424, 440-41 (1974); *United States* v. *Driscoll*, 496 F.2d 252 (2d Cir. 1974). Pacelli has made no showing which would permit review of his sentence by this Court.

Pacelli makes a further argument that Judge Stewart imposed sentence improperly because he failed to give a statement of the reasons for the sentence which he was imposing. Even if the claim were factually accurate, it is settled that, whatever the desirability of doing so, a District Judge need not give a statement of reasons for the sentence imposed. *Dorszynski* v. *United States*, *supra*, 418 U.S. at 441-42; *United States* v. *Valazquez*, *supra*, 482 F.2d at 142; *United States* v. *Driscoll*, *supra*. In point of fact, however, Judge Stewart did give a statement of his reasons which was more than adequate under the circumstances.*

(2d Cir., March 13, 1975). The relevant defendants in the first three cases listed were convicted of violation of Title 21, United States Code, Section 848, for engaging in continuing criminal narcotics enterprises, and under Section 848(c), are ineligible for parole. The defendant in *Rivera* was convicted of aiding and abetting the murder of one narcotics agent and the serious wounding of another. The opinions of this Court disclose nothing about the offenses or the offenders involved that suggests in any way that Pacelli's punishment is disproportionate.

It is also not amiss to note that a different District Judge imposed the same sentence on Pacelli when he was first convicted in this case.

* "The Court: As I started to say, Mr. Pacelli, the imposition of sentence is always difficult. It is extremely difficult in this case. In imposing sentence I have in mind a number of things, and in particular I have in mind the two prior convictions in this court for very serious crimes.

Among the traditional and accepted general principles to be followed in imposing sentence I have in mind especially the need for protection of the public, the need for deterrence of others.

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Pacelli next claims that the Court "erroneously relied upon defendant's 'two prior convictions in this court for very serious crimes' despite defense counsel's earlier statement that defendant stood before the court for sentencing on this offense as a first offender" (Pacelli Brief, p. 61).* To argue that Pacelli's two prior narcotics convictions should not be considered is preposterous. Title 18, United States Code, Section 3577; Rule 32(c)(2), F.R.Cr.P. See also *Williams* v. *New York*, 337 U.S. 241, 246 (1949); *United States* v. *Sweig*, 454 F.2d 181 (2d Cir. 1972); *United States* v. *Doyle*, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); *United States* v. *Schipani*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971); *United States* v. *Needles*, 472 F.2d 652 (2d Cir. 1973); *United States* v. *Cifarelli*, 401 F.2d 512 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968); *United States* v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974).

Pacelli makes an additional related argument—that each of his previous sentences for narcotics offenses was heavily influenced by the murder of Patsy Parks, and that his sentence here was his "third" sentence for that crime. Pacelli speculates in support of this contention that there

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The crime of which you have been convicted is a particularly deliberate, callous, brutal crime. Of course quite different from the two crimes which you have been previously been convicted of.

Therefore, I am going to sentence you to life imprisonment, which is consecutive with the two sentences which have previously been imposed upon you in this court on Count 1, and, on Count 2 I will sentence you to five years concurrently with the sentence on Count 1." (Tr. 3839)

* This is the third offense with regard to which Pacelli has argued that he is a first offender:

1. May 22, 1972—Sentencing—71 Cr. 614 before the Honorable Milton Pollack (Sentencing transcript, p. 2).
2. February 26, 1974 and March 15, 1974—Sentencing—73 Cr. 881 before the Honorable Milton Pollack (Sentencing transcripts, pp. 3-4 and 13-14 respectively).
3. February 28, 1975—Sentencing—73 Cr. 105 before the Honorable Charles E. Stewart (Sentencing transcript, pp. 20-21).

Of necessity only one of these statements can be correct.

was ". . . substantial evidence that Judge Pollack weighed heavily the Parks murder in his meting out 35 years in two previous sentences. . . ". (Pacelli Brief, pp. 65-66).

The record of those sentences belies this. At Pacelli's sentencing on 71 Cr. 614 no mention of the Parks murder is found. Judge Pollack merely stated that "[t]he Court is convinced that the defendant is an amoral and hardened individual and is relatively certain from the trial record herein and the Court's observations of the witnesses and their testimony that the defendant has been involved in narcotics trafficking on a large scale and manner." (Sentencing Minutes 71 Cr. 614, May 22, 1972, p. 8). This was preceded by an unrebutted statement made by government counsel as to the ease with which Pacelli obtained large amounts of narcotics and the fact that when he was arrested, he attempted to bribe the arresting officer. *Id.*, pp. 5-7.

In the sentencing for 73 Cr. 881 on February 26, 1974 there is no indication that Judge Pollack heavily relied on the Parks murder in imposing the sentence. When defense counsel suggested that reference to an alleged murder involving Pacelli's father was improper, Judge Pollack replied: "Let's talk about this case, Mr. Duke, that is what I am here to listen to." (Sentencing Minutes, February 26, 1974, p. 7). On March 15, 1974, the adjourned date of the senencing on 73 Cr. 881, Judge Pollack clearly indicated the precise basis of his sentencing in that case:

> "You have seen the report. To try to mount a legal argument on the basis of what some social inquiry officer writes in his report and to suggest that that represents the thinking of the judge and the basis on which he operates, is just a complete exercise in futility; just nothing to that.
>
> * * * * *
>
> *Based on the independent consideration I have given to this matter, independent of anything that has gone before, and relative only to the case and the*

> *people before me*, I am satisfied that the judgment herein should be and hereby adjudge that this sentence shall be consecutive to the sentence of the defendant in this court imposed on April 22nd, 1972 under Indictment 71 Crim. 614 being served and after that sentence has been completed, the defendant be committed under the indictment herein, 73 Crim. 881, to the custody of the Attorney General or his authorized representative for a term of 15 years on each of Counts 1, 2 and 6 to run concurrently and he is fined the sum of $25,000 on each of said Counts 1, 2 and 6 for total fines of $75,000 and they are committed fines. . . ." (*Id.*, pp. 18, 26-27; emphasis supplied).

Again there is no indication that the Court relied on the Parks murder in sentencing Pacelli to 15 years imprisonment for narcotics offenses. To the contrary, Judge Pollack clearly stated that this sentence was independent of "anything that has gone before." In any event, even if Pacelli's argument had some basis in fact, which it does not, it would be foreclosed by *Williams* v. *Oklahoma*, 358 U.S. 577, 584-86 (1958), and 18 U.S.C. § 3577.

Pacelli's last and most novel claim is that the sentence imposed by Judge Stewart violated the general rule against increase of sentence on retrial enunciated by the Supreme Court in *North Carolina* v. *Pearce*, 395 U.S. 711, 723-26 (1969). The only basis for such a claim is that the term of life imprisonment imposed by Judge Tenney after Pacelli's first conviction in this case ran consecutively to the twenty year term imposed by Judge Pollack on Pacelli's first narcotics conviction, while Judge Stewart's sentence ran consecutively not only to this twenty year term but also to Judge Pollack's subsequent consecutive fifteen year sentence upon Pacelli's conviction for further narcotics offenses in *United States* v. *Mallah*, *supra*. The sentence in *Mallah* was imposed following the reversal by this Court of Pacelli's conviction in this case after his trial

before Judge Tenney. The conviction in *Mallah* occurred long after Pacelli's trial and sentence before Judge Tenney in this case—it was returned by the jury just three days before this Court reversed Pacelli's first conviction in this case.

Pacelli's claim under *Pearce* comes down to an argument that Judge Stewart increased the sentence imposed by Judge Tenney because he made it run consecutively to a sentence imposed on a conviction which did not even exist at the time Judge Tenney imposed sentence. Pacelli cites no case in which the general rule enunciated by *Pearce* has been applied to the circumstances of this case, nor have we uncovered any. Moreover, in *Pearce* the Court was presented with a case in which a defendant, having upset on appeal his conviction and sentence to ten years imprisonment, was sentenced after a retrial on the same charges to twenty-five years imprisonment. The Court, in addition, formulated its inquiry in *Pearce* as directed to ". . . the broader problem of what constitutional limitations there may be upon the general power of a judge to impose upon reconviction a *longer* prison sentence than the defendant originally received." 395 U.S. at 719 (emphasis supplied). Under this formulation of the issue, it is clear that *Pearce* is inapplicable to the case here, for Judge Stewart's sentence is not "longer" than that imposed by Judge Tenney; rather, it is exactly the same—life imprisonment on Count One and five years imprisonment on Count Two, the sentences to be served concurrently. Whether *Pearce* would be extended by the Court to apply to the imposition of a sentence upon retrial for the same term of years but consecutive to an earlier sentence to which, when first imposed, it ran concurrently is an issue which this Court need not address, since Judge Pollack's sentence in *Mallah* had not been imposed at the time Judge Tenney first sentenced Pacelli in this case. As the Court stated in *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 25 (1973):

> "*Pearce* was not written with a view to protecting against the mere possibility that, once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process. The possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process."

Moreover, while *Pearce* appeared to state a rigid prophylactic rule against any increase in sentence absent intervening factors in order to guard against the fear of judicial retaliation on the part of defendants considering appeals, *Moon* v. *Maryland*, 398 U.S. 319, 320-21 (1970), establishes that *Pearce* is inapplicable in the absence of a "dispositive" averment that an augmentation of sentence occurred on account of judicial vindictiveness. Pacelli makes no such claim here. *See also Chaffin* v. *Stynchcombe*, *supra*. Nor could he, for Judge Stewart can hardly have felt the slightest bit vindictive about the reversal—on the grounds of a violation of Section 3500 by the prosecutor and the admission of hearsay evidence—of a conviction secured before another judge of a large, multi-judge District Court. *Cf. Chaffin* v. *Stynchombe*, *supra*, 412 U.S. at 27; *United States ex rel. Ferrari* v. *Henderson*, 474 F.2d 510, 513 (2d Cir.), *cert. denied*, 414 U.S. 843 (1973).

Moreover, even if *Pearce* were otherwise applicable, it is clear that the increase in Pacelli's sentence by Judge Stewart, if it is *arguendo* characterized as such, was permitted by the express terms of *Pearce*, which allows increases in sentence upon retrial if the reasons for doing so are made clear by the sentencing judge and if they are "... based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Id. at 726. Here the intervening conduct was Pacelli's conviction, and its affirmance on appeal, on further narcotics charges in

United States v. *Mallah*, *supra*, to which Judge Stewart made specific reference when he imposed sentence. While it might be argued that the charges in *Mallah* refer to events which preceded in time Pacelli's murder of Patsy Parks and that, accordingly, under the quoted language of *Pearce*, his intervening *conviction* on the charges in *Mallah* does not permit an increase in sentence, given the significance of prior convictions to the sentencing process, it seems plainly unreasonable to suggest that the quoted language in *Pearce* should be read so literally as to exclude from consideration on sentence an intervening conviction or convictions for a serious crime. *But cf. United States* v. *Lopez*, 428 F.2d 1135 (2d Cir. 1970).

Practical considerations support this result. The issue raised by Pacelli could have been mechanically foreclosed by the Government's delaying the trial in *Mallah* until the then pending appeal and subsequent retrial in this case had been completed, a result far more toxic to the administration of justice than holding *Pearce* inapplicable to this case. Indeed, if Pacelli's arguments under *Pearce* were accepted, and if the Government did not adopt the course outlined above, the sentence imposed on a conviction reversed on appeal would always have to run concurrently, upon subsequent retrial, with any sentence imposed on an intervening conviction, with the necessary practical result that no meaningful punishment could be imposed on the intervening conviction unless the term of the sentence exceeded by happenstance that of the original sentence reversed, a windfall for defendants hardly contemplated by *Pearce* and wholly inconsistent with the principles underlying its holding.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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JAMES E. NESLAND,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

JAMES E. NESLAND being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 18th day of June, 1975 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

STEVEN B. DUKE, ESQ.
PIERCE O'DONNELL, ESQ.
127 Wall Street
New Haven, Connecticut

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

James E. Nesland

Sworn to before me this

18th day of June, 1975.

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977